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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOHN B. CARROLL, ESQ.
918 Onondaga County Sav. Bank Bldg.
Syracuse, New York 13202

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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To the Honorable WARREN E. BURGER, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus d/b/a South Eastern Industrial District, hereby petition for a Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Second Circuit entered in the above case, and in support thereof does state as follows:

I.

OPINIONS DELIVERED IN COURTS BELOW

On December 5, 1969 the United States District Court for the Northern District of New York, (Port, J.) rendered an unreported Memorandum Decision and Order, a copy of which is appended to this Petition, (pages 15 to 26).

On December 1, 1970 the United States Court of Appeals for the Second Circuit rendered an unreported Per Ciriam Decision affirming the Judgment of the District Court, appended to this Petition, (pages 27, 28).

II.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Circuit Court if December 1, 1970, and the time of its entry is December 1, 1970. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question is Section 1254 of Title 28 of the United States' Code.

III.

QUESTIONS PRESENTED

1. Does the case of United States v. Dow, 357 U.S. 17, holding an assignment of a condemnation claim is void under 31 U.S.C. 203, the Federal Anti-Assignment statute, apply to the within case, or may the United States by its option prevent that Decision from applying?

2. Can Summary Judgment be granted by the District Court where questions involving the extent and application of the New York parol evidence rule exist and where the law of New York is that parol evidence questions involving extrinsic documents present parol evidence questions which require trial and can not be resolved on Summary Judgment.

IV.

STATUTES INVOLVED

Statute — Title 31, Section 203, United States Code.

§ 203. Assignments of claims; set-off against assignee

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgement, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided,

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except

any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued. R.S. § 3477; May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, § 1, 54 Stat. 1029; May 15, 1951, c. 75, 65 Stat. 41.

V.

STATEMENT OF CASE

In 1954, the petitioners for substantial consideration purchased a large eight-story office building located in the prime downtown center of Syracuse, New York, a community of upwards of 200,000 persons, drawing upon an additional 200,000 persons for its trading activities.

The office building so purchased was and is one of the major office buildings in Syracuse, and its equity value above mortgages at the time of the events complained of herein was in excess of $1,000,000.

At the time of purchase, virtually the entire premises were subject to a twenty-year lease to the United States which commenced in 1946, and terminated on December 31, 1966.

On December 19, 1966, after unsuccessful negotiations for continuance of the government lease and while the lease was still in effect, the Government filed a notice of partial taking of scattered portions of the building for six months only with an option of renewal, a copy of which attached to pages 29, 30.

It is the position of the petitioner SEID that the manner of condemning the building occupancy on a scattered basis together with the heating, electrical, elevators and other facilities inflicted severance damage to the remainder of the building which then could not be marketed, or rented.

Because the rental being paid by the Government for the occupation of the space for which it filed condemnation was not sufficient to pay mortgage interest, principal, or taxes and operating expense, the premises went into foreclosure at the insistence of City Investing Company who was the second mortgagee and who now appears in this suit as the alleged assignee.

The exercise of the renewal option by the Government in May of 1967 was the final blow to the petitioner SEID who ultimately was forced to execute a Deed in lieu of foreclosure to avoid personal liability, and also the document of assignment of interest in the condemnation award, which is contested in this action. All for $10,000., less than 1% of the real value.

The petitioner maintains the assignment of the condemnation award was a partial assignment of rents only, and that the severance and consequential damages portion was reserved to it, by collateral agreements and documents.

It maintains that the Respondent City Investing Company moving papers for Summary Judgment covered this in part when the attorney for City Investing stated in his moving papers that on May 8, 1967, Mr. Shafer, attorney for the petitioners wrote to him:

> "It is also our understanding that Southeastern Industrial District will retain its claims against the Government. This should resolve any problems which may arise in your mind concerning the Federal Statute against Assignment. We would assume that the right to rent would go along with the Deed and that we could be estopped from any claims against the mortgagee by virtue of having sold our Deed to them."

And that was later confirmed by a letter from City Investing Company which stated:

CITY INVESTING COMPANY
980 Madison Avenue
New York, N. Y. 10021

Howard F. Noonan
Vice President
and
Treasurer

Telephone
(212) YUkon 8-8000

Cable Address
Cicovest

September 14, 1967.

Messrs. Walter J. Sampson,
Bernard Greenbaum, Abner J. Mesirow
and Arthur A. Bogeaus, Co-Partners
doing business as
SOUTHEASTERN INDUSTRIAL DISTRICT,
799 Elm Street,
Winnetka, Illinois.

Gentlemen:

With reference to the sale by you to us of property situated in the City of Syracuse, New York, including the building known as the Chimes Building, and the assignment by you to us of all rents due and to become due for the use and occupancy of said property, including all sums found to be due from the United States of America, resulting from the condemnation by the United States of America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York as Civil Action No. 66-CV-483, we understand and agree that such assignment does not include any claims, rights or damages which you may have against the United States of America or any of its sub-divisions or bureaus for compensation in lieu of restoration and rehabilitation which may be due to you, as Landlord, with respect to the Chimes Building, in accordance with the provisions of the lease dated December 3, 1946, between Onondaga Holding Corp. and The United States of America and any extensions thereof or agreements supplemental thereto.

We further understand and agree that such assignment does not include any claims, rights or damages which you may have for compensation, award or settlement from

the United States of America or any of its sub-divisions or bureaus for loss of equity which you may have sustained resulting from any wrongful or arbitrary use of the power of condemnation.

Said claims, rights or damages for compensation in lieu or restoration or rehabilitation and for loss of equity are reserved to you and are distinguished from any right to compensation payable by the United States of America as rent for the use and occupancy of the Chimes Building, pursuant to its condemnation proceeding, designated as Civil Action No. 66-CV-483.

Very truly yours,

CITY INVESTING COMPANY

s/ Howard F. Noonan
HOWARD F. NOONAN

Thereafter the following Assignment was executed.

ASSIGNMENT

We, WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW and ARTHUR A. BOGEAUS, Copartners, doing business as SOUTHEASTERN INDUSTRIAL DISTRICT, and having an office at 799 Elm Street, Winnetka, Illinois, in consideration of the sum of One Dollar and other good and valuable consideration, to us in hand paid by CITY INVESTING COMPANY, a New York corporation with its principal office at 980 Madison Avenue, New York City, New York, the receipt whereof is hereby acknowledged, and for the purpose of effecting a transfer to CITY INVESTING COMPANY of all of our right, title and interest in and to certain premises located in the City of Syracuse, New York and more fully described in a deed bearing even date herewith and to be recorded in the Onondaga County Clerk's Office in Syracuse, New York, including all rents due and to become due for the use and occupancy of said real property, do hereby assign to said CITY INVESTING COMPANY, its successors and assigns, all of our right, title and interest in and to any sum of money found to be due from the United States of America resulting from the condemnation by the United States of

America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York under the following title:

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK	
United States of America,	Plaintiff,
-vs-	
Certain Space in the Property Known as the Chimes Building, 109 West Onondaga Street, Syracuse, Onondaga County, State of New York, et al,	Civil Action No. 66-CV-483 Defendants.

and we empower said CITY INVESTING COMPANY in its own name or in our names to do and perform all acts, matters and things touching the premises in like manner to all interests and purposes, and, if necessary, to bring appropriate proceedings in said condemnation for the substitution of itself in our place as defendant in said action for the purpose of recovering to its own use all sums to be found to be due and owing from the United States of America by reason of such condemnation.

We covenant that we will not at any time hereafter take any steps whereby the monies found to be due and owing from the United States of America as a result of any adjudication, award or settlement of Civil Action #66CV 483 or any part thereof shall be paid to us except for the purpose of transmitting the same by endorsement or otherwise to CITY INVESTING COMPANY nor will we do any act whereby CITY INVESTING COMPANY, its successors or assigns, may be prevented or hindered from enforcing payment of the same; we further covenant that we and all persons claiming under us, including our heirs, executors and assigns, shall and will, from time to time, or at any time hereafter, execute such further assurances for effectually assigning the said monies found to be due and owing from the United States of America to CITY INVESTING COMPANY, its successors or assigns, as it or they or it or their counsel in law shall require.

IN WITNESS WHEREOF, we have executed this Assignment this 2nd day of October, 1967.

WALTER J. SAMPSON
Walter J. Sampson

BERNARD GREENBAUM
Bernard Greenbaum

ABNER J. MESIROW
Abner J. Mesirow

The assignment as indicated was for the purposes of rent only, but City Investing Company instead of obtaining a full award, settled the entire claim with the United States for an amount equal to rent only by the following stipulation:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff
VS
CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL. Defendants

Civil No. 66-CV-483

WHEREAS, City Investing Company, a New York Corporation, with its principal office at 980 Madison Avenue, New York, New York, represents that as of November 30, 1967, it was the owner of the real property commonly known and described as the Chimes Building, 109 West Onondaga Street, Syracuse, New York, which building is the subject of this condemnation action, said real property having been conveyed to it in fee simple by Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Arthur A. Bogeaus, Copartners d/b/a Southeastern Industrial District, by deed dated August 15, 1967 and recorded in Onondaga County Clerk's Office October 17, 1967 in Book 2356 of Deeds at page 128 &c.

WHEREAS, as such owner of said building, City Investing Company claims that it, solely, is entitled to the compensation to be paid by the United States of America for the taking of the right of use and occupancy of certain portions of said Chimes Building, as the same is more particularly described in the Declaration of Taking filed herein on December 29, 1966, for the period from January 1, 1967 to November 30, 1967.

NOW THEREFORE, it is hereby STIPULATED and AGREED by and between the United States of America, plaintiff herein, and City Investing Company as follows:

1. That City Investing Company hereby appears herein by Hancock, Ryan, Shove and Hust, Esqs., of Syracuse, New York, and consents to be joined as a party defendant in this condemnation action.

2. That the total just compensation to be paid by the United States of America for the taking of the rights and interest in the Chimes Building, as the same are more particularly described in the Declaration of Taking filed herein, is the sum of One Hundred Seventy-eight Thousand, Seven Hundred Dollars ($178,700.00), which sum includes interest, restoration damages and compensation for all other damages or claims for damages arising out of or by reason of said taking.

3. That the sum of One Hundred Forty Thousand, Eight Hundred Ninety-one and 65/100 Dollars ($140,891.65) previously withdrawn from the Registry of the Court by and paid to Edgar T. Mengarelli, as Receiver, pursuant to Orders of this Court filed herein on July 10, 1967 and October 18, 1967, is to be credited against the just compensation herein stipulated leaving a balance of Thirty-seven Thousand, Eight Hundred Eight and 35/100 Dollars ($37,808.35) to be paid by the condemnor.

Dated this 30 day of September, 1968.

Stipulation approved

CITY INVESTING COMPANY

BY: HOWARD F. NOONAN
Vice President

by: HANCOCK, RYAN, SHOVE & HUST
Hancock, Ryan, Shove and Hust
Attorneys for City Investing Company

UNITED STATES OF AMERICA

BY: JUSTIN F. MOHONEY
UNITED STATES ATTORNEY,
Northern District of New York

The United States then moved District Court for an Order of Confirmance of the settlement.

While not designated as such, the Motion was treated by the District Court as a Motion for Summary Judgment, and Summary Judgment was granted.

The United States Court of Appeals, by Per Curiam Decision, affirmed the Judgment of the District Court.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Lower Court decisions are either in conflict with United States v. Dow, 357 U.S. 17, 78 S. Ct. 1039, or raise important questions concerning proper law to be applied to extensive and numerous contractual interests arising daily from Governmental transactions involving assignments which only this Court can resolve.

2. The Summary Judgment was based upon the determination of issues by use of the parol evidence rule, without reference to the law of the State of New York where the Court was sitting. Such Summary Judgment would be

improper under that law. (See attached Opinion in Exchange Leasing Corporation v. Bundy, 29 A.D. (2) 828). Therefor there is raised a question of the scope and application of both the parol evidence rule and its relation to State Law.

3. Summary Judgment was made in violation of Rule 56 (c) Fed. R. Civ. P. as interpreted in Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724.

4. In the interests of justice the petitioner should not be foreclosed from a trial of its position, and an opportunity to receive full compensation for its interest as defined in United States v. General Motors Corporation, 323 U.S. 373, 65 S.Ct. 357, 382.

5. The assignment which was before monies were liquidated in amount is void under the Anti-Assignment Act and the Lower Court holdings are in conflict with National Bank of Commerce v. Downie, 218 U.S. 345, 31 S. Ct. 89. Compare Martin v. National Surety Co., 300 U.S. 588, 57 S. Ct. 531, and cases collected at 12 ALR (2) 460, 468-475 (1950). Further, under the law of New York the assignment gives rise to no equities between the parties, Manhattan Commercial Co. v. Paul, 216 N.Y. 481.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case.

Respectfully submitted,

John B. Carroll

JOHN B. CARROLL
918 Onondaga Bank Building
Syracuse, New York

Appendix A — District Court Decision.

EDMUND PORT, Judge

Memorandum-Decision and Order

City Investing Company (hereafter "CIC"), claiming to be entitled to the entire amount of the award in the above-entitled condemnation action, has moved to fix the total just compensation at the sum of $178,700.00, [1/] and for a determination that said amount be awarded to itself and to the exclusion of all other claimants. While not designated as such, the motion will be treated as one for summary judgment; for the reasons hereinafter stated, summary judgment is granted for the relief requested.

CIC bases its claim to the entire award to the exclusion of all others, on an assignment from Southeastern Industrial District (hereafter "SID"). The right of CIC to the entire award, and to stipulate its amount, is contested by SID, the owners of the subject premises at the time the Declaration of Taking, the Complaint in Condemnation, and the Order awarding possession to the United States were filed.

The facts in this case may be set forth as follows:

The Declaration of Taking and the Complaint in Condemnation in this action were filed on December 29,

---

1/ By a stipulation dated September 30, 1968, between CIC and the United States, it was stipulated and agreed:
(1) that CIC appeared in the action and consented to be joined as a party defendant, and
(2) that the total just compensation to be paid by the United States for the taking of the rights and interests in the Chimes Building, is the sum of $178,700, which sum includes interest, restoration damages and compensation for all other damages or claims for damages arising out of or by reason of said taking, and
(3) that the sum of $140,891.65, previously withdrawn from this court and paid to the Receiver pursuant to the orders of this court, is to be credited against the just compensation stipulated, leaving a balance of $37,808.35 to be paid by the condemor United States.

1966, and $76,850.00 was deposited in the Court for estimated just compensation. The estate sought to be condemned was "the right to use and occupy" certain portions of the Chimes Building for:

> a term commencing January 1, 1967, and ending June 30, 1967, with the Government having the right to extend the said use and occupancy of said property for six (6) months to December 31, 1967, upon thirty (30) days prior written notice to the owners, and with the Government having the right to terminate at any time upon giving thirty (30) days prior written notice to the owners, and with the right to make alterations, additions and improvements and with the right in the United States to remove within a reasonable time after expiration of said initial term or any extension thereof or any earlier effective date of termination, any and all improvements and structures placed therein or thereon by or for the United States during its use and occupancy of the property under said initial term or any extended term. Complaint in Condemnation, Schedule "A", page 3.

On December 29, 1966, the Court granted an Order of Possession to the United States as of January 1, 1967, on which date SID was the owner of the property.

On March 30, 1967, CIC commenced a state court foreclosure action, to foreclose certain mortgages that it held upon the said Chimes Building. The New York State Supreme Court for Onondaga County (Mead, J.) granted an Order on March 31, 1967 appointing a Receiver for the benefit of CIC to receive all rents and profits then due or to become due, pending the foreclosure action.

On July 5, 1967, this Court granted leave to the Receiver to intervene in this proceeding and be made a

party defendant, and ordered payment to the Receiver of the sum of $76,850 on deposit, to be credited against the sum fixed and determined by final order and judgment of this Court as just compensation for the taking of the property.

On May 26, 1967, the United States elected to renew its leasehold on portions of the Chimes Building for an additional 6 months from July 1, 1967 to Dec. 31, 1967, and on June 14, 1967 deposited the sum of $76,850 in the Court, which represented the estimated compensation for the right to use and occupy for the additional period.

A stipulation was entered into on October 16, 1967 among the United States, the Receiver, SID, and the Equitable Life Assurance Society of the United States (hereafter "Equitable"), to the effect that (1) the United States continue to occupy the premises until November 30, 1967 (instead of the period previously elected by the plaintiff), and that (2) an order should be entered directing the Clerk to pay the Receiver, out of the $76,850 deposited in the Court, the sum of $64,041.65 as rental for the period of July 1, 1967 to November 30, 1967, said sum to be credited against the just compensation to be fixed. 2/ Based on the stipulation, an Order dated and entered October 18, 1968 directed payment of $64,041.65 to the Receiver, said sum to be applied against just compensation.

Pursuant to an agreement between SID and CIC, CIC accepted a deed to the Chimes Building from SID, recorded October 17, 1967, in lieu of foreclosure. As part of the transaction, CIC paid $10,000.00 to SID, and SID, "for the purpose of affecting a transfer to City Investing

2/ The parties, including SID, fixed the sum to be paid the Receiver "as rental" for the 5 months period at 5/6 of the amount deposited as just compensation for a six month period.

Company of all our right, title and interest in and to [Chimes Building], including all the rents due and to become due for the use and occupancy of said real property," executed a written assignment dated October 2, 1967, the pertinent parts of which are set forth in full in the footnote below. 3/

On November 28, 1967, the foreclosure action in the

3/ The Assignment, in pertinent part, reads as follows:

[SID does] hereby assign to said CITY INVESTING COMPANY, its successors and assigns, all of our right, title and interest in and to any sum of money found to be due from the United States of America resulting from the condemnation by the United States of America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York under the following title: [giving caption of 66-CV-483], and we empower said CITY INVESTING COMPANY in its own name or in our names to do and perform all acts, matters and things touching the premises in like manner to all interests and purposes, and, if necessary, to bring appropriate proceedings in said condemnation for the substitution of itself in our place as defendant in said action for the purpose of recovering to its own use all sums found to be due and owing from the United States of America by reason of such condemnation.

We covenant that we will not at any time hereafter take any steps whereby the monies found to be due and owing from the United States of America as a result of any adjudication, award or settlement of Civil Action #66CV 483 or any part thereof shall be paid to us except for the purpose of transmitting the same by endorsement or otherwise to CITY INVESTING COMPANY nor will we do any act whereby CITY INVESTING COMPANY, its successors or assigns, may be prevented or hindered from enforcing payment of the same; we further covenant that we and all persons claiming under us, including our heirs, executors and assigns, shall and will, from time to time, or at any time hereafter execute such further assurances for effectually assigning the said monies found to be due and owing from the United States of America to CITY INVESTING COMPANY, its successors or assigns, as it or they or it or their counsel in law shall require.

State Supreme Court was dismissed, the notice of pendancy cancelled, the Receivership terminated, and the Receiver was directed to surrender possession of the premises to CIC and settle his account as said Receiver.

The defendants Irving Trust Company and James A. Austin were the holders, as trustees, of a consolidated second mortgage lien; they assigned said mortgage to CIC by an instrument dated March 27, 1967 and recorded on March 30, 1967, and by reason thereof have no further interest in this proceeding.

The defendant Equitable was, prior to January 1, 1967 and subsequent to November 30, 1967, the holder of a consolidated first mortgage lien covering the Chimes Building.

CONTENTIONS OF THE PARTIES

SID's opposition to CIC's motion is three-pronged: (1) CIC derived no rights under the October 2, 1967 assignment because it "is void and of no force and effect" pursuant to the provisions of the Anti-Assignment Act (31 U.S.C. §203), and (2) SID has restoration claims arising out of a lease which terminated on December 31, 1966, which the stipulation of September 30, 1968 and the order sought herein purport to include, and (3) that SID has a "residual interest in these proceedings" by reason of a letter dated September 14, 1967 attached to its answering affidavit,[4/] which it claims reserved from

4/ That letter, from CIC to SID, reads as follows:

Messrs. Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Arthur A. Bogeaus, Co-Partners, doing business as SOUTHEASTERN INDUSTRIAL DISTRICT, 799 Elm Street, Winnetka, Illinois.

September 14, 1967.

Gentlemen:

With reference to the sale by you to us of property situated in the City of Syracuse, New York, including the

the assignment its claim for restoration damages under the lease expiring December 31, 1966, and a claim for "loss of equity which [it] may have sustained resulting from any wrongful or arbitrary use of the power of condemnation."

4/ (fn. continued)

building known as the Chimes Building, and the assignment by you to us of all rents due and to become due for the use and occupancy of said property, including all sums found to be due from the United States of America, resulting from the condemnation by the United States of America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York as Civil Action No. 66-CV-483, we understand and agree that such assignment does not include any claims rights or damages which you may have against the United States of America or any of its sub-divisions or bureaus for compensation in lieu of restoration and rehabilitation which may be due to you, as Landlord, with respect to the Chimes Building, in accordance with the provisions of the lease dated December 3, 1946, between Onondaga Holding Corp. and the United States of America and any extensions thereof or agreements supplemental thereto.

We further understand and agree that such assignment does not include any claims, rights or damages which you may have for compensation, award or settlement from the United States of America or any of its subdivisions or bureaus for loss of equity which you may have sustained resulting from any wrongful or arbitrary use of the power of condemnation. (sic)

Said claims, rights or damages for compensation in lieu or/ restoration or rehabilitation and for loss of equity are reserved to you and are distinguished from any right to compensation payable by the United States of America as rent for the use and occupancy of the Chimes Building, pursuant to its condemnation proceeding, designated as Civil Action No. 66-CV-483.

Very truly yours,

CITY INVESTING COMPANY
/s/ Howard F. Noonan
Howard F. Noonan

CIC takes the position that it is entitled to the entire award by reason of the assignment; that the parties, in negotiating, were aware of the rights accruing to the United States under the Anti-Assignment Act and to protect against the possible assertion of that statute by the Government, the last paragraph of the assignment was added, which constitutes a separate and severable agreement under which SID should be equitably estopped from asserting any objection to the payment of CIC.

The problem, apparently, has its genesis in the use of the terms "rents" and "just compensation" interchangeably by the parties. 5/

5/ For example, (see fn. 2 also), the affidavit of Edgar T. Mengarelli, the Receiver of the Chimes Building property, made in support of a motion for an order directing the Clerk to make a rental payment to him, and sworn to on September 22, 1967, contains the following language of interest:

"* * * on June 14, 1967, there was deposited by the plaintiff with the Clerk of this Court as estimated just compensation for the estates, rights and interest as more particularly set forth in the Declaration of Taking, the Complaint and the Notice of Election to Renew herein, the sum of Seventy-six Thousand Eight Hundred Fifty Dollars ($76,850.00), which sum was alleged by the plaintiff to represent the estimated just compensation for said additional taking and for the use of said property for the renewal period beginning July 1, 1967, and ending December 31, 1967." Affidvait, page 2. and:

"That said deposit made by the plaintiff with the Clerk of this Court on June 14, 1967, constitutes rent for the use and occupancy of the premises described in the Complaint herein and that your deponent, as Receiver as aforesaid, is entitled thereto for the reasons set forth in deponent's affidavit sworn to April 26, 1967, in support of deponent's motion to obtain the first deposit, which motion was granted; a true copy of said affidavit of April 26, 1967, is annexed hereto, made a part hereof and market Exhibit 'D'." Affidavit, page 3.

As long as judgment is entered in accord with the stipulation of September 30, 1968, the Government has agreed not to assert the Anti-Assignment Act and defendant Equitable has waived its right to lay claim to any part of the just compensation. However, if SID has some residual rights left under the assignment, Equitable, in that case, asserts that it becomes entitled to them under the condemnation clause found in its first mortgage.

SID's assertion that the assignment is void is without merit. The Anti-Assignment Act is for the government's protection and only the United States may assert it. See, e.g., Martin v. National Surety Co., 300 U.S. 588 (1937); McKenzie v. Irving Trust Co., 323 U.S. 365 (1945); Segal v. Rochelle, 382 U.S. 375 (1966); Toles v. United States, 371 F. 2d 784 (10th Cir. 1967); and United Pacific Insurance Co. v. Timbers Access Industries Co., 277 F. Supp. 925 (D. Ore. 1967).

SID contends that by CIC's letter of September 14, 1967,[6] any restoration claims existing at the end of the period of taking (November 30, 1967), and a "claim for loss of equity," were excluded from the assignment. However, in the course of the oral argument and in the chamber conferences, it was recognized by all the parties that any restoration claims existing by reason of the lease

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5/ (fn. continued)

Further, the affidavit requested an order directing payment of "the sum of $44,402.15, being the rent for the use and occupancy of said premises for the period from July 1, 1967, to October 14, 1967, based upon plaintiff's estimate of just compensation for the use and occupancy of said premises for the period from July 1, 1967, to December 31, 1967, without prejudice to deponent's right to have ascertained the just compensation for the taking herein. Dated: September 22, 1967." Affidavit, page 4.

6/ See footnote 4, supra.

expiring on December 31, 1966 were not effected by this action, and that the restoration damages for the eleven-month period covered by this section were inconsequential. Further, the letter of September 14, 1967 clearly refers to restoration damages under the lease of December 3, 1946, and extensions thereof which expired on December 31, 1966.

SID has not explained what the claimed "loss of equity" constitutes, or whether it is a cognizable element in the fixing of just compensation. In any event, such damages would not be considered independently, if at all, in determining just compensation. See United States v. General Motors Corp., 323 U.S. 373 (1956) and Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); but cf. United States v. Certain Land at Irving Place & 16th St., 415 F. 2d 265 (2d Cir. 1969).

To support its contention that "loss of equity" was reserved from the assignment, SID relies upon the specific exclusions from the assignment found in the letter of September 14, 1967 from CIC to SID, (see fn. 4).

Whether reserved from the assignment or not seems to be of small moment, since by its own terms the "loss of equity" damage is limited to that "resulting from any wrongful or arbitrary use of the power of condemnation", in effect, equivalent to a physical seizure without a condemnation proceeding and a claim over which the Court of Claims and not this court would have exclusive jurisdiction. Myers v. United States, 323 F. 2d 580, 583 (9th Cir. 1963), see also, United States v. Dow, 357 U.S. 17, 21 (1958) (emphasis added).

All the previous correspondence cited by the parties as indicative of their intention, was integrated in the subsequently executed assignment. Accordingly, it is only the assignment which determines the rights of the parties.

See Restatement of Contracts, §§237 et seq., 4 Williston on Contracts, §§ 631 et seq. (3rd Ed. 1961), Richardson on Evidence, §§ 578 et seq. (9th Ed. 1964). Further, the assignment was without reservation of any kind, and SID assigned to CIC "all of our right, title and interest in and to any sum of money found to be due from the United States of America resulting from the condemnation by the United States of America * * * ."

Even if SID had some residual rights left under the assignment, Equitable, as noted earlier, asserts that it becomes entitled to them under the condemnation clause 6/ in its first mortgage. This stands as a further bar to SID's claim.

The effect of the assignment by SID to CIC and the condemnation clause in SID's first mortgage with Equitable,

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6/ That clause reads as follows:

> 20. The party of the second part for themselves, their heirs, legal representatives, successors and assigns, does hereby assign to said party of the first part, its heirs, legal representatives, successors and assigns any and all awards heretofore made and hereafter to be made to the present and all subsequent owners of the mortgaged premises, including any award and awards for change of grade of any street affecting said mortgaged premises, and said party of the first part, its heirs, legal representatives, successors and assigns is hereby authorized and empowered to collect and receive such award and awards and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the amount owing on said bond and mortgage, notwithstanding the fact that amount owing on said bond and mortgage may not then be due and payable, and said party of the second part for themselves, their heirs, legal representatives, successors and assigns covenants and agrees with said party of the first part, its heirs, legal representatives, successors and assigns upon request to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning said award and awards to the holder of said bond and mortgage, free, clear and discharged of any encumbrances of any kind or nature whatsoever.

leaves SID without any interest in the condemnation award. The rights or remedies of SID outside of the award, if any, remain undisturbed.

Under the circumstances, the motion of the petitioner CIC is granted as hereinafter provided, and it is

ORDERED that City Investing Company a New York corporation with its principal place of business at 980 Madison Avenue, New York, New York, be and it hereby is joined as a party defendant in this action, and the notice, complaint, and the proceedings herein are amended accordingly; and it is further

ORDERED that summary judgment be granted herein:

(1) Condemning the premises described in Schedule "A" of the Complaint herein to the extent of the estate set forth therein, and

(2) Fixing the total just compensation to be paid by the United States of America for the taking of the rights and interests herein, as the same are more particularly described in the Complaint and all of the proceedings filed herein, in the sum of $178,700.00, which sum includes interest, and

(3) Decreeing that the petitioner CIC is entitled to said just compensation and that no other party to this action is entitled to any part of said just compensation, and

(4) That the sum of $140,891.65 previously withdrawn from the Registry of the Court by and paid to Edgar T. Mengarelli, as Receiver, pursuant to Orders of this Court filed herein on July 10, 1967 and October 18, 1967, be credited against the just compensation herein granted, leaving a balance of $37,808.35 to be paid by the condemnor, the plaintiff herein, and

(5) That judgment in the sum of $37,808.35 with

interest, be entered in favor of City Investing Company against the United States of America.

EDMUND PORT
United States District Judge

Dated: December 5, 1969
Auburn, New York

Appendix B — United States Court of Appeals, Second Circuit Decision.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 96—September Term, 1970.

(Argued October 8, 1970 Decided December 1, 1970.)

Docket No. 34674

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 West Onondaga Street, Syracuse, Onondaga County, State of New York, *et al.*,

Defendants-Appellants.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal by the defendant, Southeastern Industrial District, from an adverse summary judgment in a condemnation action brought by the United States in the United States District Court for the Northern District of New York, Edmund Port, *Judge.* Affirmed.

Appendix C — Interest Condemned.

Beginning at a point on the westerly side of South Salina Street distant 214.33 feet northerly from the corner formed by the intersection of the westerly side of South Salina Street and the northerly side of West Adams Street; running thence South 72 degrees 28 minutes 00 seconds West 264.34 feet to the easterly side of South Clinton Street; thence along the easterly side of South Clinton Street North 17 degrees 31 minutes 00 seconds West 57.75 feet to the southerly side of the right of way; thence along the southerly side of the right of way North 72 degrees 28 minutes East 93.40 feet; North 71 degrees 14 minutes 50 seconds East 30 feet to the easterly side of said right of way; thence North 17 degrees 28 minutes 30 seconds West 51.9 feet to the northerly side of said right of way; thence along the northerly side of said right of way South 72 degrees 28 minutes West 30.48 feet; thence North 17 degrees 28 minutes 30 seconds West 83.10 feet to the southerly side of West Onondaga Street; thence along the southerly side of West Onondaga Street North 44 degrees 18 minutes 50 seconds East 194.80 feet to the corner formed by the intersection of the southerly side of West Onondaga Street and the westerly side of South Salina Street; thence along the westerly side of South Salina Street South 17 degrees 28 minutes 30 seconds East 285.62 feet to the point or place of beginning.

Said premises being known as 109 West Onondaga Street, Syracuse, New York.

Appendix B — United States Court of Appeals, Second Circuit Decision.

JOHN B. CARROLL, Esquire, Syracuse, New York (Nottingham, Carroll, Palz, Coughlin & Conan and Adolph H. Huttar, Esquire, Syracuse, New York, on the brief), *for Appellants Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus, d/b/a Southeastern Industrial District.*

WILLIAM L. ALLEN, JR., Esquire, Syracuse, New York (Hancock, Estabrook, Ryan, Shove & Hust, Syracuse, New York, on the brief), *for Defendant-Appellee City Investing Company.*

DIRK D. SNEL, Esquire, Department of Justice, Washington, D. C. (Shiro Kashiwa, Assistant Att'y General, James M. Sullivan, Jr., U. S. Attorney, Syracuse, New York, Samuel T. Betts, III, Assistant U. S. Att'y, Syracuse, and Raymond N. Zagone, Esq., Department of Justice, Washington, D. C., on the brief), *for Plaintiff-Appellee United States of America.*

MELVIN AND MELVIN, Syracuse, N. Y., *on the brief for The Equitable Life Assurance Society of the United States, Defendant-Appellee.*

PER CURIAM:

The judgment of the district court is affirmed, substantially for the reasons set forth in Judge Port's opinion. —— F. Supp. —— (1969).

Appendix C — Interest Condemned.

The right to use and occupy that certain interest in land and the buildings and improvements thereon, being part of the basement containing 4,000 square feet as shown on Schedule "B", the entire 3rd, 8th, 9th and 11th floors each containing 11,163 net rentable square feet as shown on Schedule "B" attached hereto and made a part hereof for a total of 48,652 net rentable square feet of space, together with elevators No. 2 and 3, their shaftways and wells from the basement to the roof and/or penthouse, in the Chimes Building, 109 West Onondaga Street, Syracuse, New York, together with the right of access to and the use in common with the owners, of all electrical, mechanical and operational equipment affixed thereto, and the right, in common with the owners, their assigns and the public, to the use of the lobby space for purposes of ingress and egress, for office, storage, clinical and other related uses, for a term commencing January 1, 1967, and ending June 30, 1967, with the Government having the right to extend the said use and occupancy of said property for six (6) months to December 31, 1967, upon thirty (30) days prior written notice to the owners, and with the Government having the right to terminate at any time upon giving thirty (30) days prior written notice to the owners, and with the right to make alterations, additions and improvements and with the right in the United States to remove within a reasonable time after expiration of said initial term or any extension thereof or any earlier effective date of termination, any and all improvements and structures placed therein or thereon by or for the United States during its use and occupancy of the property under said initial term or any extended term. The land is more particularly described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, and being part of Block 120 Syracuse, bounded and described as follows:

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No. 1410

IN THE

Supreme Court of the United States

October Term, 1970

CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second District

---

BRIEF FOR RESPONDENT CITY INVESTING COMPANY IN OPPOSITION

WILLIAM L. ALLEN, JR.
One Mony Plaza
Syracuse, New York 13202

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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I.

Opinions Below

The opinion of the United States District Court for the Northern District of New York, (Port. U.S.D.J.) is now reported at 320 F. Supp. 491.

The decision of the United States Court of Appeals for the Second Circuit is now reported at 435 F. 2d 872.

II.

Questions Presented

1. Did the Courts below err in concluding that the Anti-Assignment Act, 31 U.S.C. 203, was for the Government's benefit and protection, and that Petitioners' assignment of all their rights to "any sum of money" from the condemnation was a valid basis for payment to the assignee, where the Government had not asserted the Act but had recognized the assignment?

2. Was summary judgment proper on the Record that showed an explicit written assignment of "all . . . of our interest in and to any sum", and the petitioners' later attack on that assignment was based on prior writings never shown by a party to the assignment to be a part of the final express assignment transaction?

III.

Statement of Case

By a complaint in condemnation, filed December 29, 1966, the United States condemned a portion of the Chimes

Building in Syracuse, */ for a period of six months commencing January 1, 1967 with a right to renew. Previously the Government had leased a greater portion of the Chimes Building under a 20-year lease, expiring December 31, 1966.

Some few months after the taking, City Investing as holder of the second mortgage on the premises commenced foreclosure proceeding for defaults by Petitioner. After negotiations extending to October, 1967, a formal assignment was made by petitioners of "all" of our "right, title and interest in and to any sum of money found to be due from the United States . . . resulting from the condemnation by the United States", and City Investing because owner of the premises by a deed from petitioners recorded October 17, 1967.

The foreclosure action was subsequently dismissed. **/

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*/ The authority for the taking was

> "the act of August 1, 1888 (25 Stat. 357, c728), as amended, the Act of February 26, 1931 (46 Stat. 1421, c307), as amended, the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, (63 Stat. 377), as amended; and Independent Offices Appropriation Act, 1967, approved September 6, 1966 (80 Stat. 663)." (Petitioners' "Appellants Appendix" to Court of Appeals, p. 1)

and the jurisdiction of the District Court was conferred by Title 28, Section 1358, United States Code.

**/ Petitioners assert that their execution of the deed and assignment was "forced . . . to avoid personal liability" (Petition, p. 7). No such claim was made in the District Court. Moreover, such is not the case, since the terms of the mortgage provided: "The mortgagor herein shall not be required personally to assume the indebtedness secured by this consolidated mortgage and the mortgagee herein, its successors and assigns agree to look solely to the real property covered by this consolidated mortgage and in the event of any default hereunder, the mortgagee, its successors and

(Continued)

The assignment contained the further language:

"we empower said CITY INVESTING COMPANY in its own name or in our names to do and perform all acts, matters and things touching the premises . . . and, if necessary, to bring appropriate proceedings in said condemnation for the substitution of itself in our place as defendant in said action for the purpose of recovering to its own use all sums to be found to be due and owing from the United States of America by reason of such condemnation.

We covenant that we will not at any time hereafter take any steps whereby the monies found to be due and owing from the United States of America as a result of any adjudication, award or settlement of Civil Action #66CV 483 or any part thereof shall be paid to us except for the purpose of transmitting the same by endorsement or otherwise to CITY INVESTING COMPANY nor will we do any act whereby CITY INVESTING COMPANY, its successors or assigns, may be prevented or hindered from enforcing payment of the same; we further covenant that we and all persons claiming under us, including our heirs, executors and assigns, shall and will from time to time, or at any time hereafter, execute such further assurances for effectually assigning the said monies found to be due and owing from the United States of America to CITY INVESTING

(Footnote continued)

assigns agree not to sue the mortgagor or bring any action for a personal moneyed judgment against the mortgagor." Onondaga County Clerk's Office, Book of Mortgages, 1530 at p. 41.

The note had similar language. The foreclosure action did not seek any deficiency judgment. Onondaga County Clerk's Office, Civil Action, Index No. 67-1780.

COMPANY, its successors or assigns, as it or they or it or their counsel in law shall require." */

However, upon City Investing's application for payment of the remainder of the amount stipulated between City Investing and the Government to be just compensation for the January 1, 1967 taking, Petitioners opposed through their attorneys affidavit, urging:

"ADOLPH H. HUTTAR, being duly sworn, deposes and says:

1. I am the attorney for Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Arthur A. Bogeaus, d/b/a Southeastern Industrial District (hereinafter referred to as "SEID"), a party interested in the captioned proceeding and am the successor counsel to the firm of Mackenzie, Smith, Lewis, Michel, and Hughes, former attorneys for SEID.

2. On or about the 21st of October, 1968, SEID was served with a motion by City Investing Company for an order pursuant to Rule 71A of the Federal Rules of Civil Procedure to (1) fix the total compensation to be paid by the United States for the taking of the rights and interests in the Chimes Building, (2) for a determination that City Investing Company be declared the sole interested party in this action, and (3) for a discontinuance of the captioned action on the merits. This affidavit is submitted in opposition to the aforesaid motion.

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*/ The petition is misleading in setting forth only the names of three of the petitioners on the assignment. In fact all four executed the assignment. (Petitioners "Appellant's Appendix" pp. 26-27. Cf. District Ct. opinion, Petition p. 17-18.

3. That unless otherwise stated, the statements made herein are made on information and belief.

4. From 1947 until December 31, 1966, the United States Government was the lessee of over 95% of the Chimes Building in Syracuse, New York. The government's condemnation took place on January 1, 1967, and the government remained in possession until November 30th of that year. SEID was the fee owner of the Chimes Building from February 29, 1952, until August 15, 1967, at which time SEID delivered a deed of the fee to City Investing, the moving party, which also held a second mortgage on the Chimes Building.

5. The assignment relied on in the present motion is void and of no force and effect, having not come into inception or being by virtue of the provisions of law. Title 31 U.S.C.A. § 203 reads in pertinent part as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

This fact was construed by the United States Supreme Court in U.S. v. Dow, 78 S. Ct. 1039 (1958) to be binding and mandatory. The facts in the Dow case are strikingly similar to the facts in the present case.

A copy of that opinion has been attached hereto for the convenience of the Court.

6. In addition, the proposed settlement purports to include all claims for restoration against the United States. However, SEID has restoration claims arising out of the government's lease of the Chimes Building up to December 31, 1966, which cannot be the subject of the settlement of the condemnation procedure. Any restoration claims under the instant suit arise out of the government's occupancy during the condemnation period only.

7. It is respectfully submitted that the only interested party in these proceedings, and the only party who can be interested as a matter of law is SEID, the owner in possession on the date of filing of the notice of taking.

8. The defendant SEID also asserts in the alternative that by virtue of the arrangement evidenced by the attached letter agreement, SEID has a residual interest in these proceedings.

9. That SEID disapproves of the proposed settlement.

WHEREFORE, your deponent respectfully requests that this motion be denied and that an order be entered directing that SEID is the only party entitled to have an interest in this proceeding.

ADOLPH H. HUTTAR

Adolph H. Huttar

(Sworn to December 16, 1968)."

(Petitioners' "Appellant's Appendix" to the U.S. Court of Appeals, Second Circuit, p. 37-39.)

The District Court treated the application for payment as a motion for summary judgment, and granted the relief requested. The United States Court of Appeals for the Second Circuit affirmed.

Argument

Essentially Petitioners are quarrelling with two points applied in the lower courts: (1) The validity between the parties of an assignment of all interest in a condemnation award, in a case where the Government has not asserted any objection under the Anti-Assignment Statute; and (2) The conclusion that Petitioners did not adequately negate the absolute terms of the assignment of "all interest in any sum" so as to create a triable issue of fact.

On neither of these points does a review of this case show a conflict with the decisions of this Court, nor, on the question of summary judgment, any conflict with the applicable standards of federal law, or of the law of New York.

I.

There is no conflict with cases construing the Anti-Assignment Statute.

The Anti-Assignment Act, 31 U.S.C. Section 203, despite its broad terminology is not construed to absolutely nullify "all transfers and assignments". Assignments of claims are recognized as effective between the parties thereto.

Segal v. Rochelle, 382 U.S. 375, 384 (1966).

The Act is construed and applied in accordance with its purpose of protecting the Government.

Segal v. Rochelle, 382 U.S. 375 (1966) at 384, citing Martin v. National Surety Co., 300 U.S. 588 (1937).

And, it has long been established that the protection of the statute can be waived by the Government.

Freedman's Saving & Trust Co. v. Shepherd, 127 U.S. 494 (1388) at 505-506.

Petitioners urge a conflict with the holding of this Court in United States v. Dow, 357 U.S. 17 (1958). But there, the government did object to the assignment and asserted the prohibition of the Anti-Assignment Act. Such is not the case here, and this case is plainly distinguishable. Thus, there is no conflict with the Dow case.

Petitioners also assert conflict between this case and National Bank of Commerce v. Downie, 218 U.S. 345 (1910) and Manhattan Commercial Co. v. Paul, 216 N.Y. 481 (1916) -- two cases holding assignments absolutely void. But the construction of the Act in the Downie case, relied on in the Paul case, was disavowed by this Court in Martin v. National Surety Co., 300 U.S. 588 (1937), see esp. 596-597. This was recognized in more recent cases, see Segal v. Rochelle, 382 U.S. 375 (1966); Matter of Ideal Merchantile Corporation, 244 F. 2d 828 (2d Cir. 1957) at 832; Bingham & Co. v. Bie, 133 N.Y.S. 2d 453 (Sup. Ct. N.Y. Co. 1954).

The language of this Court in Freedman's Saving & Trust Co. v. Shepherd, 127 U.S. 494 at 506 that:

> "Here, the officers of the government chose to recognize the assignment . . . "

fits equally here, and so does the conclusion there that:

> "of their action neither [of the private parties] . . . can rightfully complaint. (Matter in brackets added).

See also Leonard v. Whaley, 91 Hun. 304 at 307, 36 N.Y. Supp. 147, at 148 (2d Dep't 1895) cited with approval in Segal v. Rochelle, 382 U.S. at 384.

This case then contains no holding contrary to the past decisions of this Court on the Anti-Assignment Act.

Neither the Federal Rules nor State Law was violated by the grant of Summary Judgment here.

The assignment instrument was clear and unambiguous as to the transfer to City Investing of all rights and interests in this condemnation, leaving no interest to support Petitioners' present claim.

Cf. Maloney v. John Hancock Mutual Life Ins. Co., 271 F. 2d 609 (2d Cir. 1959);

Northwest Oil & Refining Co. v. Honolulu Oil Corp., 195 F. Supp. 281, 286, 287 (D. C. D. Mont. 1961).

Petitioners have cited Exchange Leasing Corp. v. Bundy, 29 A. D. 2d 828 (4th Dep't 1968) to escape the force of its unambiguous assignment, and the parol evidence rule. As noted by the court in that case raising the defense of usury, the parol evidence rule "would not apply in any event, because it appears that . . . the separate written document [option to repurchase] . . . was definitely a part of the entire agreement." The Record on Appeal in that case shows plainly that Bundy by his own affidavit as well as by deposition of plaintiff showed facts proving that the lease, the basic document relied on, was not an entire integration to which the parol evidence rule would apply.

Here, that kind of showing is lacking, supra p. 4 to 6.

To successfully oppose summary judgment, even where resort to parol evidence would be allowed at trial, a real showing of opposer's version of the facts -- in evidentary form -- is required. Ehrlich v. Amer. Moninger Greenhouse, 26 N. Y. 2d 255 (1970) at 259.

Petitioners' affidavit in opposition, is plainly insufficient to meet the standards of F. R. Civ. P. 56(e), since

it is made only "on information and belief", not personal knowledge (supra p. 5). */

Automatic Radio Mfg. Co. v. Hazeltime Research Inc., 339 U.S. 827 (1950) at 831;

6 Moore, Federal Practice (2d ed.) par. 56.22[1] at pages 2803-2806.

See also N.Y. Civil Practice Law and Rules, Section 3212 requiring personal knowledge of affiant.

The case cited by Petitioners' -- Sartor v. Arkansas National Gas Corp. 321 U.S. 620 (1944) dealt principally with the insufficiency of affidavits of experts, setting forth their opinion of value, to justify summary judgment where such value was the disputed issue. Sartor is not analogous to this case.

In the circumstances shown by the papers in this case, there is no issue of importance regarding summary judgment procedure to be reviewed by this Court.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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One Mony Plaza
Syracuse, New York 13202

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*/ And without even stating any basis for the information and belief.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1410

CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A) is reported at 320 F. Supp. 491. The opinion of the court of appeals (Pet. App. B) is reported at 435 F. 2d 872.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1970. The petition for a writ of certiorari was filed on March 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Anti-Assignment Act (31 U.S.C. 203) provides in pertinent part:

> All transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

QUESTIONS PRESENTED

1. Whether, when the United States has specifically waived the requirements of the Anti-Assignment Act (31 U.S.C. 203), the assignment by a condemnee to another of "any sum of money found to be due from the United States" in a pending condemnation suit precludes the assignor from disputing, on the ground that the assignment did not comply with the Act's requirements, the award of compensation (pursuant to stipulation entered into by the United States and the assignee).

2. Whether summary judgment was properly granted in the circumstances of this case.

STATEMENT

This condemnation action involves an office building previously owned by petitioners. When the United States took temporary occupancy of part of the building (Pet. App. C), petitioners' title was subject to a mortgage. The mortgagee, City Investing Company ("City"), subsequently sought foreclosure of

its mortgage, but later in lieu of foreclosure accepted from petitioners a deed to the building and an assignment of petitioners' interest in the pending condemnation proceeding between petitioners and the government.[1]

Following this transaction, City and the United States stipulated that the total just compensation for the temporary taking was $178,000 (Pet. 11–13). City then petitioned the district court for distribution. The government advised the district court that if the judgment for total compensation was for the stipulated amount, it would not assert a defense based on the Anti-Assignment Act (see Pet. App. A 22).

Petitioners objected to the proposed distribution, and argued that City derived no rights under the assignment because the Anti-Assignment Act invalidated it. They also contended that in any event they had reserved from the assignment certain claims against the government for alleged restoration damages and "loss of equity."

The district court rejected petitioners' objections, fixed the condemnation award at the stipulated amount, and ordered distribution of the entire award

[1] Petitioners assigned to City "any sum of money found to be due from the United States of America resulting from the condemnation" then pending in the district court and empowered City to intervene in that suit as substitute condemnee. Petitioners further convenanted not to interfere with distribution to City of any condemnation proceeds payable "as a result of any adjudication, award or settlement." See Pet. 9–10.

to City.[2] It held that "[t]he Anti-Assignment Act is for the government's protection and only the United States may assert it" (Pet. App. A 22), and that therefore the assignment was not void as between petitioners and City. As to the restoration damages and the loss of equity questions, the court held that the present condemnation proceeding did not include or even affect these matters (Pet. App. A 22–25). The court of appeals affirmed *per curiam* "substantially for the reasons set forth" in the district court's opinion (Pet. App. B 28).

ARGUMENT

1. The petitioners are not entitled, as they urge (Pet. 13–14), to avoid their assignment to City or to protest the stipulation between City and the United States concerning just compensation because of the prohibitions of the Anti-Assignment Act (31 U.S.C. 203). The Act is for the benefit and protection of the United States. It is intended to relieve the United States from negotiating or litigating with strangers to the events giving rise to the claim and to preserve defenses which the United States has against the original claimant. *United States* v. *Shannon,* 342 U.S. 288, 291–292. The government may, as it did here, refrain from invoking the Act's protections (see *McGowan* v. *Parish,* 237 U.S. 285, 294). In such circumstances the Act does not disturb the rights of the parties to the assignment or relieve the assignor of

[2] The court treated City's petition as a motion for summary judgment (see Pet. App. A 15).

his obligations under it. See *Segal* v. *Rochelle*, 382 U.S. 375, 381–382, 384; *Martin* v. *National Surety Co.*, 300 U.S. 588, 596–597; *Freedman's Saving and Trust Co.* v. *Shepherd*, 127 U.S. 494, 506; see, also, *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 237, n. 1. Petitioners' reliance (Pet. 2, 13) on *United States* v. *Dow*, 357 U.S. 17, is misplaced because there the government, not a private party, asserted that the Act invalidated the assignment in question (see 357 U.S. at 27).

2. There were no disputed factual issues resolved by the granting of summary judgment in this case. Petitioners' claimed restoration damages related to a period prior to the taking, and were accordingly not at issue in the condemnation proceeding. And, as the district court held (Pet. App. 23), the loss of equity claim was not an independent element in determining just compensation for the taking and was, in any event, expressly limited to damage resulting from "wrongful or arbitrary use of the power of condemnation." The courts below correctly held that, as a matter of law, such a claim, if it did survive the assignment, was not cognizable in the present proceeding but must be presented to the Court of Claims (*id.*). Since there were no disputed factual issues concerning what was to be decided here, it was proper for the district court to enter summary judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SHIRO KASHIWA,
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MARCH 1971.

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No. 1410

IN THE

Supreme Court of the United States

October Term, 1970

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF on Behalf of the Petitioners Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus, d/b/a Southeastern Industrial District.

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CITATIONS

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IN THE

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CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL.,

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v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF on Behalf of the Petitioners Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus, d/b/a Southeastern Industrial District.

The Petitioners, Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus, d/b/a Southeastern Industrial District, in reply to the Opposition Brief of the United States and the Opposition Brief for the Respondent, City Investing Company does hereby state as follows:

I.

OPINIONS BELOW

The Opinion of the District Court (Petitioners' Appendix A) is reported at 320 F. Supp. 491. The Opinion of the

Court of Appeals (Petitioners' Appendix B) is reported at 435 F. 2d 872.

II.

ARGUMENT

1. From the opposing Briefs Petitioners are only able to discern two cases cited to the Court for the issue in question in issue one, i.e. the authority of the United States to determine at its option whether United States v. Dow, 357 U.S. 17 shall apply to an assignment executed before final adjudication.

At pages 4-5 of the Solicitor General's Brief that authority is cited as follows:

> "The Government may as it did here refrain from invoking the Act's protection. (See McGowan v. Parrish, 237 U.S. 285, 294."

Curiously, the Respondent City Investing Company does not cite or rely on the McGowan case, but, rather in its Brief at Page 7 it states:

> "And it has long been established that the protection of the Statute can be waived by the Government. (Freedman's Savings & Trust Company v. Shepherd, 127 U.S. 494 (1888), at 505-506."

These cases now alleged to be controlling were not relied upon by either the District or the Circuit Court in making their decision, and it now appears that neither the Government nor the Respondent City Investing Company rely upon the authorities cited to this point by the District Court or the Circuit Court. (See Petitioner's Appendix A, Page 22, Opinion of the District Court.)

In a matter of such importance one would expect a more clear-cut line of authorities.

In any event, neither the McGowan nor Freedman's cases (supra) involved a pending condemnation proceeding, as did the Dow case (supra). In each of these cases there was completed prior litigation on the merits, and in the words of the Supreme Court "final adjudication" to and including the United States' Supreme Court on the propriety and basis for payment, terminating in a Final Order of this Court. The role of the Government as an interested party had come to a practical end. (See McGowan at page 295 and Freedman's at page 506.)

Further, in each case the original holder had expressly consented to the jurisdiction of the Court (McGowan, Page 295, and Freedman's, Page 506). 1/

The Court, in Freedman's was careful to state the applicable rule where these events had not occurred, and at page 506 stated:

> "There could not have been any valid transfer or assignment of it in advance of its allowance, which could have been made the basis of a suit by the Assignee against United States, or which would compel the Government to recognize a transfer or assignment. It is, perhaps, also true that, under some circumstances, the Assignor, before the allowance of the claim and the issuing of the warrant may disregard such an assignment altogether."

1/ Against a claim of invalidity by a mortgagor and trust company, the Court continued on to base its recognition of the assignment on the fact the Government was no longer a rightful party having been "acquitted of any liability in respect to the claim of rent, for its officers have acted in conformity of the directions not only of the original claimant, but of its assignee, Shepherd and of Shepherd's trustees."

In the present case, the amount to be paid had not been determined or finally adjudicated at the time of the assignment, and the role of the Government had not come to an end.

Further, the Assignor asserts and asserted in the proceedings a strenuous objection to payment and questioned both the validity and the nature and the extent of the assignment.

Therefor the McGowan and Freedman's cases do not supply precedent.

It thus appears the Courts below have set sail upon the sea, following authorities no one now seriously urges, without a precedent or chart or compass, and have created a wholly new legal principal without restrictions upon this newly granted authority.

The Anti-Assignment Statute stands as frustrated, and one of its main purposes which was to prevent successful trafficking in claims, has been frustrated. The billions of dollars of the United States monies paid out annually will be without this valuable Congressional safeguard.

This Court has recognized that the Congress looked upon such trafficking as an evil to be avoided at all costs.[2/]

In the interests of the propriety and stability of such immense relationships and in the interest of justice, the Court is requested to grant certiorari.

2. The Solicitor General's Brief at Page 5 states:

2/ This result is contrary to the holding in Bailey v. United States, 107 U.S. 432, 438, 439 (1888); see also Spofford v. Kirk, 97 U.S. 484, 489-490 (1878); Goodman v. Kniblock, 102 U.S. 556, 560 (1880); Patterson v. United States, Northwestern National Bank of Minneapolis, 354 F. 2d 327, 329 (1965); Banning v. Mints, 367 F. 2d 304, 307, Cert. denied, 386 U.S. 990.

> "The Courts below correctly held that, as a matter of law, such a claim, if it did survive the assignment, was not cognizable in the present proceeding but must be presented to the Court of Claims."

This holding is directly contrary to the holding of the Fifth Circuit in the United States v. Smith, 307 F. 2d 49; quoting United States of America v. McCrory Holding Company, 294 F. 2d 812 at 816, which in turn quoted United States v. Dow (supra) at page 21, 22, where this Court stated:

> "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§1346(a)(2) and 1491, to recover just compensation. See Hurley v. Kincaid, 285 U.S. 95, 104 [52 S.Ct. 267, 76 L.Ed. 637]. Under the second procedure, the Government may either employ statutes which require it to pay over the judicially determined compensation * * * or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained." [11]

It is respectfully submitted this holding that a claim must only be presented to the Court of Claims conflicts with Meyers v. United States, 323 F. 2d 580 (C.A. 9th Cir. 1963) holding all elements of damage are properly triable where the complaint in condemnation is filed.

3. The claim of the Petitioners belongs to the Petitioners and the mortgagee has no right or interest in and

to that claim. Freedman's Savings Company v. Shepherd, (supra) at Page 502.

We respectfully direct the Court's attention to the fact that the receiver did not take possession of the property until subsequent to the condemnation, and that he was discharged without seeking to receive or receiving the condemnation award as an asset with the consent of the mortgagee. Under these circumstances the mortgagee's interest being one for security only does not ripen to the point of ownership. Further the mortgagee has modified the mortgage, and accepted the new mortgagor without reservation of right and without the agreement or consent of the Petitioners, thus releasing any interest in any security interest in the claim owned by the claimant.

4. The Respondent, City Investing Company's claim at Page 9-10 of its Brief that the moving papers were not sufficient to raise a successful issue against the Motion For Summary Judgment, is plainly in error since on the very moving papers themselves, as pointed out in the Plaintiff's Petition for Certiorari, alleged that the parties had reached an agreement in which the rents only would be assigned to go along with the Deed, but that all other portions of the Condemnation award would be reserved to the Petitioners which was later confirmed in writing by the client, City Investing Company; the answering affidavit was set forth an admission by the Respondent City Investing Company. Under such circumstances a full, triable issue is raised.

The verified answer also raised an issue of economic duress in the execution of the assignment. (Appendix A, Page 13, see wherefor clause. Also Page 11, Paragraph 13)

5. Attached hereto as Appendix A to this Reply Brief is the Answer of the Petitioner which was part of the Record submitted to the Circuit Court.

Despite the statements in the Opposition Briefs, that

Answer makes it plain at Paragraphs 5 and 18 and 21 that by reason of a scattered taking and physical occupancy there was severe consequential damage to the remainder of the building, by reason of this consequential damage the Petitioner was unable to lease the floors.

This Court has previously recognized that the scattered taking of a leasehold by the Government can inflict such damage. (United States v. General Motors, 323 U.S. 373, 382). This is the damage which the Petitioner reserved and which was settled without its consent.

III.

CONCLUSION

It would be a miscarriage of justice to ignore the realities of the situation of an owner in possession whose chief tenant in full possession of the structure prior to the taking exerts its power of condemnation in a scattered basis reduces the revenue structure of the building with a following foreclosure.

A Deed in Lieu of Foreclosure and an assignment executed under such circumstances can hardly be described as voluntary or consential.

In the interests of justice as well as in the stability of law and the enforcement of the policy of Congress in regard to trafficking in assignments, the assignment should be disregarded, and the case reversed.

It is respectfully submitted that the issues in their present form before the Court raise clear questions of law in which Summary Reversal on the part of the Court would be in the interests of justice.

Respectfully submitted,

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APPENDIX A — Answer.

(SAME TITLE).

1. Defendants, Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow, and Walter A. Bogeaus, co-partners doing business as Southeastern Industrial District, claim an interest as owners in the property known as the Chimes Building, 109 West Onondaga Street, Syracuse, Onondaga County, State of New York, and more particularly described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, and being part of Block 120 Syracuse, bounded and described as follows:

Beginning at a point on the westerly side of South Salina Street distant 214.33 feet northerly from the corner formed by the intersection of the westerly side of South Salina Street and the northerly side of West Adams Street; running thence South 72 degrees 28 minutes 00 seconds West 264.34 feet to the easterly side of South Clinton Street; thence along the easterly side of South Clinton Street North 17 degrees 31 minutes 00 seconds West 57.75 feet to the southerly side of the right of way; thence along the southerly side of the right of way North 72 degrees 28 minutes East 93.40 feet; North 71 degrees 14 minutes 50 seconds East 30 feet to the easterly side of said right of way; thence North 17 degrees 28 minutes 30 seconds West 51.9 feet to the northerly side of said right of way; thence along the northerly side of said right of way South 72 degrees 28 minutes West 30.48 feet; thence North 17 degrees 28 minutes 30 seconds West 83.10 feet to the southerly side of West Onondaga Street; thence along the southerly side of West Onondaga Street North 44 degrees 18 minutes 50 seconds East 194.80 feet to the corner formed by the intersection of the southerly side of West Onondaga Street and the

westerly side of South Salina Street; thence along the westerly side of South Salina Street South 17 degrees 28 minutes 30 seconds East 285.62 feet to the point or place of beginning.

2. Defendants respectfully urge the following objections and defenses to the taking of their property and their estate therein as aforesaid.

3. That the entire condemnation complaint is unreasonable, unrealistic and inequitable.

4. That prior to January 1, 1967, and for a period of approximately 20 years, under the terms of Government Lease No. WA6pb-6730, the United States Government occupied substantially all of the afore-described premises, in that of the 120,000 net usable square feet of commercial and office space therein, the United States Government occupied all except for approximately 4,000 net usable square feet leased to the Lincoln National Bank and Trust Co., a small penthouse leased to the Western Union Company, and 1,500 net usable square feet leased to Neugent Accountants.

5. That Schedule "A" of Plaintiff's complaint requests the condemnation of a part of the basement, together with the entire third, eighth, ninth and eleventh floors of the aforesaid twelve-floor property; and that it also comprehends the condemnation of two of the five elevators on the premises; that the haphazard taking of the third, eighth, ninth, and eleventh floors amounts to a virtual taking of the entire Chimes Building; and that such condemnation would render exceedingly difficult, if not impossible, the renting of the other, separated floors to any prospective tenant, and would have a substantially adverse effect upon the marketability of the premises.

6. That the United States Government should be required to condemn either the entire fee interest in the Chimes Building or the entire leasehold interest therein.

Appendix A - Answer.

AS A SECOND AND FURTHER OBJECTION AND DEFENSE

7. Defendants respectfully demonstrate the following facts to the Court:

8. That in February, 1966, the United States Government advertised in the Syracuse, New York area for bids on approximately 70,000 net usable square feet of office space to house those Government agencies which had previously been occupants of the Chimes Building as aforesaid; and that on March 16, 1966, Defendants made their initial offer in writing to the General Services Administration, offering the entire Chimes Building, except for the small penthouse, at a reasonably low rental, the Government to assume interior and exterior maintenance, and the payment of taxes and insurance; and in addition offering to negotiate the installation of major capital improvements; and further offering to negotiate the terms of the lease on a basis equitable to both parties.

9. That Defendants, acting in good faith, made the above offer to the Government, but the Government unilaterally rejected the same, stating, in part, that its needs were for only 80,000 net usable square feet of office space.

10. That subsequent to this time, and after a lengthy series of fruitless negotiations, Defendants again wrote to Plaintiff offering approximately 80,000 net usable square feet of office space to include the eight upper floors of the Chimes Building under a five year lease, the Government to maintain the premises; that such lease contemplated a complete renovation and redecoration by Defendants to include the installation of new heating, lighting and air conditioning systems along with other items; and that the other terms would be substantially similar to those under which the Government's then current lease with Defendants operated.

11. That the above offer was imminently reasonable,

taking into consideration the major capital improvements contemplated by Defendants, and taking into consideration the fact that it represented but a slight rise over that rental set by Plaintiff and Defendants over twenty years earlier.

12. That at the same time, and as one alternative to the above proposed lease, Defendants gave the Government the option of having Defendants assume the operation of the building, at a small fixed increase in price; and that as a further alternative, Defendants offered to lease the entire Chimes Building to the Government for a period of two years, at a rental of only 10% more than that set between the parties in 1946.

13. That subsequent to this, and on November 17, 1966, faced not only with the prospect of losing their tenant of approximately 97% of the premises, but faced with substantial amounts of monthly tax, insurance and mortgage payments as well, and having notified the Government of the urgency of their position, Defendants offered to lease 80,000 net usable square feet of office space to the Government for six months at a rental, again approximately 10% more than that set between the parties in 1946, based upon square feet of occupancy.

14. That on November 28, 1966, Plaintiff, knowing of Defendants' precarious financial condition as concerns the above-mentioned premises, claimed to need only 30,000 net usable square feet of office space; and that finally, in its Condemnation Complaint filed December 29, 1966, Plaintiff demanded almost 50,000 net usable square feet.

15. That throughout the latter portion of its negotiations with Defendants, the plaintiff used the imminent "possibility" of condemnation as an instrument of negotiation; and that the Government should not be allowed to do by condemnation what it could not do through good faith negotiation.

AS A THIRD AND FURTHER OBJECTION AND DEFENSE

16. Defendants respectfully point out to the Court that the provisions relating to the term of the lease in condemnation are arbitrary, harsh, impractical and imminently unfair.

17. That Plaintiff has demanded the right to occupy the premises in question for a six-month term, extendible for another six months upon only thirty days notice; that Plaintiff has demanded the right to terminate upon thirty days notice at any time, even during the initial six-month term; and that Plaintiff has demanded, along with the right to remove at any time upon thirty days notice, that it be given a "reasonable time" to remove, with no realistic limits set thereon.

18. That the Chimes Building is a valuable office building located at a five-corner intersection in the heart of downtown Syracuse, New York; that because of the character and location of the premises, it would naturally demand a substantial rental on the open market; and that prospective tenants, faced with such a rental would be most unlikely to agree to it when their date of occupancy is so entirely unpredictable.

AS A FOURTH AND FURTHER OBJECTION AND DEFENSE

19. Defendants respectfully point out to the Court, that Plaintiff was fully apprised of Defendants' financial difficulties arising out of the proposed condemnation; and that despite this, Plaintiff has made no provision in its Condemnation Complaint for a deposit to be made into Court.

20. That such deposit is essential to enable Defendants to meet their daily and monthly financial obligations for mortgage payments, insurance, taxes, etc.; that the amount of such deposit should, in no event, be less than $75,000.

AS A FIFTH AND FURTHER OBJECTION AND DEFENSE

21. Defendants respectfully point out to the Court that Plaintiff is presently occupying more of the premises than its Condemnation Complaint would indicate, in that Government agencies are still occupying certain portions of the first, fifth and twelfth floors; and that in this respect, the Condemnation Complaint is inaccurate and misleading.

WHEREFORE, since the Government, as shown above, has, by this condemnation, placed Defendants ownership in a position of imminent disaster, Defendants respectfully urge a reformation of the Condemnation Complaint:

1.) That the entire Chimes Building be condemned either by a taking of the fee or the entire leasehold interest therein; and

2.) That if the taking is of the leasehold interest, the period of taking should be definite and certain and for a period of not less than one year; and

3.) That upon termination, the Government should be required to remove itself from the premises forthwith, and in any event not later than 30 days after the effective date of termination; and

4.) That the Government be required immediately to deposit with Defendants, a sum of not less than $75,000 to be applied against any and all damages arising from the taking, whether it be of the fee or the leasehold interest;

together with such other and further relief as to the Court seems justified and proper.

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